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No. 132, ORIGINAL

In the
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to the Preliminary Report and the Second Report of the Special Master

THE STATE OF NORTH CAROLINA'S SUR-REPLY BRIEF

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
GRAYSON G. KELLEY*
Chief Deputy Att'y General
JOHN F. MADDREY
Assistant Solicitor General
RONALD M. MARQUETTE
Special Deputy Att'y Gen.
MARK A. DAVIS
Special Deputy Att'y Gen.
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: (919) 716-6900

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**Counsel of Record*

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THE STATE OF NORTH CAROLINA'S SUR-REPLY BRIEF

I. NORTH CAROLINA HAS SOVEREIGN IMMUNITY AGAINST THE COMMISSION'S CLAIMS.

The State of North Carolina moved to dismiss the claims of the Commission on the ground that the Commission's claims are barred by the Eleventh Amendment and by the constitutional and common law principles of sovereign immunity embodied in that Amendment. In response, the Special Master -- following the analysis proposed by the Solicitor General -- held that a non-State party may overcome a State's sovereign immunity from suit in federal court only if two conditions are satisfied: (1) the State is already being sued by another plaintiff against whom the State cannot assert sovereign immunity, and (2) "the non-State party asserts the same claims and seeks the same relief" as the proper plaintiff. P.R. 6. Concluding that it still remains uncertain whether the Commission is asserting the same claims as the plaintiff States, the Special Master recommended rejection of North Carolina's motion at this time.

The Special Master's recommendation is incorrect for two reasons. First, the Commission's claims are *not* identical to those asserted by the plaintiff States, and thus they are barred by the principle applied by the Special Master. Second, recent decisions of this Court confirm that a State is conclusively entitled to assert sovereign immunity against claims by a non-State entity, even if the

non-State entity is asserting the same claims as other, appropriate plaintiffs.

A. The Commission's Claims Are Distinct From The States' Claims.

The Special Master's recommended ruling tracks the argument of the United States that under this Court's precedents, a non-State entity such as the Commission can join a suit against a State by other States only if the non-State entity's claims are identical to those being asserted by the States. Those precedents rest on the premise that once a claim is properly asserted against a State, it does not enlarge the judicial power of the Court if another party joins the case asserting the same claim. *See* U.S. Br. 16 ("the State's sovereign immunity 'is not compromised' by the participation of an additional party in the suit with respect to that same claim"). But if the non-State entity does *not* assert the same claim, then it cannot overcome the State's sovereign immunity from suit. If it were otherwise, for example, a private plaintiff could join a Department of Labor injunctive action against Alabama under the ADEA, and then pursue his own private monetary damages recovery against the State.

That principle requires dismissal of the Commission as a party here, because it is now clear the Commission is asserting a claim for monetary recovery -- restitution -- that is not available to the States either factually or as a matter of law. Plaintiffs' argument to the contrary is that the Commission and the States are, in fact, asserting the

same claim because the Commission's claim for restitution is actually the States' own claim for restitution. According to plaintiffs, the Commission's money belongs to the States individually, and the Commission is merely acting as the States' agent in holding and disbursing the States' funds. Pls. Reply Br. 9 ($80 million in financial assistance provided by Commission to North Carolina "belonged to the party States" and "was in all relevant respects the States' money"); *id.* at 13 n.4 ("the party States do not seek restitution of the Commission's funds, they seek restitution of their own funds that were held by their agent, the Commission"). That argument is manifestly wrong.

To start, the proposition that the States have an independent legal entitlement to restitution -- an entitlement on which the Commission is merely piggy-backing -- is directly contrary to the position the Commission advanced in No. 131, Original, and even to plaintiffs' own statements in this case. In No. 131, Original, the Commission insisted -- correctly -- that "only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it." Comm. Supp. Br., No. 131, Orig., at 6; *see id.* (emphasizing the "disconnect between the relief that the States and the Commission can obtain"); *id.* (distinguishing between "the States' great interest in the enforcement of the Commission's sanction, and the more minor relief that they can seek individually"); *id.* at 7 (action by one or more individual States "would not ... provide the Commission, or its member States, with an

adequate remedy"); *id.* at 8 ("there is no significant monetary recovery available to th[e] State[s] from this Court.").[1] The United States agreed: "The Commission is not suing North Carolina to recoup funds that are owed to the other party States," but instead was acting in its own right. U.S. Br. No. 131, Orig., at 17. And even in this case, Plaintiffs have openly conceded that "no State claims 'independent entitlement' to the restitution at issue here." Pls. Opp. MTD 6 n.1. But if the States themselves have no restitution claim they can assert independently, then it is impossible to say the Commission's restitution claim is the same as the States' (nonexistent) claim.

Plaintiffs' theory that the Commission is merely asserting a restitution claim that otherwise could be asserted independently by the States rests on one provision of the Compact, and on general agency principles. Neither supports plaintiffs' position.

1. *The Compact's "Financial Commitments" Provision Limits Liabilities And Does Not Create Assets*

Plaintiffs rely heavily on Article 4(H)(2)(b), which provides that fees and surcharges imposed on private waste generators using a regional disposal

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[1] Plaintiffs previously have noted that the States themselves were not parties to No. 131, Original, but if the Commission was acting as the States' agent -- as the States here contend -- then they are as bound by the Commission's statements as if the States themselves had made them.

facility "must represent the financial commitments of all party states to the Commission." According to plaintiffs, this provision "expressly defines the money the Commission holds as the money of the party States." Pls. Reply Br. 9.

Plaintiffs misread Article 4(H)(2)(b). The provision plainly *limits the monetary liabilities* of the member States to the Commission; it does not *create monetary assets* for them. Absent this provision, the Commission might at some future time enact a resolution requiring additional financial commitments from the member States -- like "capital contributions" by partners to a partnership. Article 4(H)(2)(b) precludes the Commission from doing so. The provision thus both establishes and limits each State's financial responsibility to the Commission: regardless of future budgetary needs, each State's obligations are deemed legally satisfied by the fees and surcharges imposed on private generators using the regional disposal facility, ensuring that no further taxpayer money would be taken from the member States' treasuries to fund the Commission's budget.[2]

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[2] Plaintiffs falsely state at one point that "the Commission collected funds *from the party States* and distributed those funds to North Carolina" Pls. Reply Br. 12-13 (emphasis added). Funds from the party States formed no part of the financial assistance provided to North Carolina. In fact, the Commission's funds were exclusively "raised through surcharges and fees imposed on waste generators who used the Barnwell facility in South Carolina." S.R. 15. *See also id.* at 42 ("It is undisputed

2. *General Agency Principles Do Not Provide The States An Independent Basis For Seeking Restitution Of The Commission's Funds*

Plaintiffs next argue that money disbursed by the Commission actually belonged directly to the States as a matter of basic agency law. Plaintiffs' position is that because the Commission acts as the agent of the States for some purposes, money belonging to the Commission necessarily belongs to the States, and thus each State is entitled to pursue a claim of restitution on its own behalf. Agency law squarely refutes that logic: while a distinct legal entity -- such as a partnership or corporation -- may be organized to act as an agent for a collective of principals (i.e., partners or shareholders) for certain purposes, it is firmly settled that monetary claims belonging to the distinct agent entity belong *only* to that entity, and *cannot* be asserted by individual principals. Thus, shareholders and partners cannot sue individually on a debt or claim that belongs to the corporation or partnership. *See Vinal v. West Virginia Oil & Oil Land Co.*, 110 U.S. 215, 215 (1884) ("One partner cannot recover his share of a debt due to the partnership in an action at law, prosecuted, in his own name alone, against the debtor."); *KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1324 (11th Cir. 2004) ("And, of course, [a partner] in his individual capacity cannot pursue a claim on behalf of [the partnership]."); *Creek v.*

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that the Commission, rather than the party States themselves, provided North Carolina with approximately $80 million in financial assistance.").

Village of Westhaven, 80 F.3d 186, 191 (7th Cir. 1996) (describing "general rule" that just as a "shareholder has no right to seek damages for an injury to the corporation, even if he is the sole shareholder. . . . a partner may not sue individually to recover damages for an injury to the partnership, even though a partnership is a thinner veil between the enterprise and its owners" (citations omitted)); *see Bromberg & Ribstein on Partnership* § 1.03(c)(3) ("a partner cannot sue individually on a claim belong to the partnership"); 59A Am. Jur. 2d *Partnership* § 448 (2003) ("a cause of action accruing to the partnership, for damages to the partnership property or interests, belongs to the partnership rather than to individual partners"). While a shareholder or partner normally may bring a derivative action *on behalf of* the entity, that claim, too, belongs *solely* to the entity; it does not belong to the individual shareholder or partner asserting the claim. *See Koster v. Lumbermens Mut. Cas. Ins. Co.*, 330 U.S. 518, 522 (1947) ("The cause of action which such a plaintiff brings before the court is *not his own* but the corporation's." (emphasis added)); *Handelsman v. Bedford Village Ltd. P'ship*, 213 F.3d 48, 54 (2d Cir. 2000) (Sotomayor, J.) (noting rule that partners lack standing to sue on debt to partnership); *Twohy v. First Nat'l Bank of Chicago*, 758 F.2d 1185, 1194 (7th Cir. 1985) ("a stockholder of a corporation has no personal or individual right of action against third persons for damages that result indirectly to the stockholder because of an injury to the corporation"); 59A Am. Jur. 2d *Partnership* § 907 (2003) ("By its very nature, a stockholder's derivative action does not seek to enforce the rights

of individual shareholders but those of the corporation, from which the shareholders derive only incidental benefit.").

Plaintiffs' theory that the States themselves could assert their own restitution claim for money disbursed by the Commission cannot be reconciled with the foregoing black-letter rule. The Compact expressly provides that "[t]he Commission . . . is a legal entity separate and distinct from the party states" and ensures that "[l]iabilities of the Commission shall not be deemed liabilities of the party states." Article 4(M)(1). The Commission is a "discrete entity created by constitutional compact . . . [that] is financially self-sufficient; it generates its own revenues, and it pays its own debts." *Hess v. Port-Authority Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994); *see Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) (reference "to a 'separate legal person'" indicates "that Congress had corporate formalities in mind"). Having chosen the limited-liability benefits of the corporate structure, the plaintiff States cannot now disregard its limitations. *See Jackson v. Volvo Trucks N. Am., Inc.*, 462 F.3d 1234, 1241 (10th Cir. 2006) ("[W]here parties choose the corporate form and receive all the benefits that flow from that structure, we should be hesitant to ignore the consequences."). Like a corporate shareholder or limited partner, the plaintiff States lack authority to pursue their own individual claims seeking recovery of moneys provided by the association entity. Those claims belong exclusively to the Commission in its own distinct legal capacity.

Plaintiffs do not and cannot cite any case from any jurisdiction holding that an individual member of a distinct legal corporate-type entity (i.e., an entity authorized to sue or be sued on its own behalf) may sue individually to recover on a debt owed to the entity. Plaintiffs rely heavily on *Central States Trucking Co. v. J.R. Simplot Co.*, 965 F.2d 431 (7th Cir. 1992), but the case actually *undermines* their position. The defendants in that case individually controlled and personally funded the association held to be their agent; each member personally directed when and how the association would ship the member's goods, and each member paid the association directly for requested shipments by depositing funds into the member's own individual account. *Id.* at 432-35 & n.2. In that situation, where the collective entity effectively acts as a trustee for each member's goods and funds, the individual member has a right to pursue and protect those funds. But where, as here, the members have only an undifferentiated interest in the entity's assets from which they derive only incidental benefits -- like the interests of shareholders in a corporation's assets or the interest of partners in partnership assets -- they "do not have standing to sue in an individual capacity for injury to the [entity]." *Fletcher Cyclopedia of the Law of Private Corporations* § 5939, at 24.

In sum, only the Commission can assert a claim for restitution of funds disbursed by the Commission to North Carolina. Plaintiffs have not identified any legal theory by which the States could pursue restitution on their own. And this Court's precedent

does not allow a State to assert a claim by a non-State entity or person that otherwise would be barred. *North Dakota v. Minnesota*, 263 U.S. 365 (1923). In *North Dakota*, the Court held that the Eleventh Amendment precluded it from maintaining jurisdiction over a claim by one State against another, where the plaintiff State was merely seeking damages to be paid directly to private persons whose own claims were barred by the Eleventh Amendment. *Id.* at 375-76.

So it is here. The States can only assert their own claims. And because they have no independent claim to restitution, the Commission cannot piggy-back its restitution claim on the States'. The Commission's claim can be asserted only by the Commission, and therefore must be dismissed.

3. *There Is No Procedural Barrier To Holding That The States Cannot Assert The Commission's Own Restitution Claim*

The Solicitor General does not disagree substantively with the foregoing analysis, but she contends that it is premature to rule that the Commission is only asserting claims that cannot be asserted by the States. The Solicitor General takes at face value the generic, combined claims for relief asserted in the Bill of Complaint, which by its terms seeks the same relief on behalf of all plaintiffs, without distinguishing between claims legally and factually available to the Commission and those legally and factually available to the States. U.S. Br. 17 & n.4. According to the Solicitor General, the

Special Master made a simple "case management" decision to reserve judgment as to whether the Commission is *permissibly* asserting the same claim as any of the States. U.S. Br. 10. That argument, says the Solicitor General, "goes to the *merits* of the claims," and therefore cannot be considered on "a motion to dismiss the Commission on *jurisdictional* grounds." *Id.* at 17.

The Solicitor General's argument simply ignores the basic procedural rules for adjudicating jurisdictional issues. The requirements of jurisdiction must be established "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see Bennett v. Spear*, 520 U.S. 154, 167-68 (1997); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 114-15 & n.31 (1979); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). Thus, at "the pleading stage, general factual allegations" adequate to establish jurisdiction will suffice. *Lujan*, 504 U.S. at 561. "In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts" sufficient to defeat the motion. *Id.* (quotations omitted).

Accordingly, plaintiffs here cannot simply rest on their Bill of Complaint's undifferentiated prayer for relief. Although North Carolina bases its argument on jurisdictional grounds, the issue is presented at *the summary judgment stage*, compelling the

Commission to put forth a concrete factual and legal theory sufficient to establish its entitlement to overcome North Carolina's sovereign immunity. And North Carolina's motion came at the express invitation of the Special Master, who rejected a similar motion at the pleading stage, holding that it was *at that time* premature to determine whether the States and the Commission had a factual and legal basis for asserting the same claims. P.R. 13. In so ruling, the Special Master stated: "North Carolina is free to renew its motion to dismiss if and when the Commission attempts to pursue a claim legally foreclosed to the States." *Id.* at 13-14. Indeed, most of the subsequent discovery process was directed at precisely that issue, *viz.*, what claim for relief was the Commission asserting, what was its basis, and how did it differ, if at all, from the claims being advanced by the States. It was in that discovery process that plaintiffs first advanced their theory that the Commission acted as the States' agent in collecting and disbursing the funds. Def. App. 102a-151a.

It is thus not premature to determine whether plaintiffs have adduced facts that, if true, would establish that the States and the Commission have identical legal claims for recovery against North Carolina based on the agency theory plaintiffs have articulated. The summary judgment record shows just the opposite: *only* the Commission can pursue a claim for restitution against North Carolina, because neither the Compact nor general agency principles gives the States any independent basis for seeking restitution of funds disbursed by the Commission, as

just shown.[3] Nothing more is needed to establish North Carolina's sovereign immunity from suit against that claim. And for that reason, North Carolina cannot be fairly accused of attempting an "end run" around the Special Master's case management efforts. U.S. Br. 10. If, as North Carolina contends, plaintiffs have not shown what they must show to proceed past summary judgment -- *viz.*, that the States have a legally cognizable and factually viable basis for asserting the same restitution claim asserted by the Commission -- then the Special Master's refusal to grant North Carolina's motion is *a substantive legal error*, not a mere case-management decision. Other than casually insulting North Carolina for invoking the normal summary judgment process for adjudicating an Eleventh Amendment jurisdictional (or any other) issue, the Solicitor General does not advance any serious *substantive* reason for denying North Carolina's motion.[4]

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[3] This is especially (but not only) true if the States' breach of Compact claim is rejected, as the Special Master recommended. Because the States did not pay money to North Carolina, they cannot pursue restitution as a contract remedy. Even if they could in theory, where there is no breach of Compact, the States most certainly have no factually or legally cognizable basis for seeking restitution. *See infra* Part II.

[4] In a footnote the Solicitor General suggests that North Carolina's request for dismissal of all claims brought by the Commission is "overbroad" "even if only the Commission could pursue restitution," because the Complaint also seeks other relief on behalf of the Commission, including

Plaintiffs, however, suggest that so long as a complaint on its face seeks relief that would overcome Eleventh Amendment barrier to suit, that suit may proceed to judgment no matter how the case develops beyond the complaint. Pls. Reply 8. That suggestion cannot be reconciled with the rule that jurisdictional challenges be evaluated according to the manner and evidence required at the successive stages of the litigation. *Lujan*, 504 U.S. at 561.[5] Further, it would be fundamentally

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summary enforcement of the sanctions order, damages, and other relief. U.S. Br. 17 n.4. The Solicitor General again misses the point: the issue is not what the Commission generally seeks in the Complaint, but whether the Commission has established a legal and factual basis for such relief adequate to survive summary judgment. The answer is no: the Commission cannot pursue relief under Count I (enforcement of the monetary sanctions) because the sanctions were not authorized by the Compact, or under Count II (breach of Contract) because the Commission was not a party to the Compact. At this stage of the proceedings, the Commission's *only* remaining claims seek restitution of the financial assistance it provided to North Carolina.

[5] Contrary to plaintiffs' assertion, nothing in *Arizona* limits the jurisdictional analysis solely to the pleading stage. Pls. Reply 8. Further, unlike here, the *Arizona* Court could tell whether or not the claims of the parties were identical by comparing the original claims of the United States with the subsequent claims asserted separately by the intervenors. The Tribes in *Arizona* intervened "to participate in an adjudication of their vital water rights that was commenced by the United States" *on their behalf*. *Arizona v. California*, 460 U.S. 605, 614

contrary to Eleventh Amendment immunity to permit a non-State entity to join a State's action on a complaint seeking undifferentiated relief, but then ultimately seek its own relief from the defendant State's treasury on a claim legally unavailable to the plaintiff State. That approach would render *North Dakota* a dead letter: there would be no reason to bar a State from asserting relief on behalf of a private party, if the private party could simply join the State's suit but ultimately pursue its own independent relief. What the States consented to in the plan of the Convention was monetary and other actions by the United States and other States -- not claims by *other* parties seeking monetary relief that neither the United States nor any State could pursue.

(1983). Here, the party States are not suing on behalf of the Commission, but purport to be asserting their own distinct rights, and the Commission has not sought to intervene merely restating the States' independent claims. *Id.* at 612. Rather, the parties have from the outset co-mingled their substantive allegations in a joint pleading, with undifferentiated claims for relief. By definition, the claims of States and non-State entities will always be identical, to the extent they rest on a joint complaint that only identifies the claims asserted and the relief sought as being on behalf of "the Plaintiffs." A State's sovereign immunity -- "a fundamental aspect of its sovereignty," *Alden v. Maine*, 527 U.S. 706, 713 (1999) -- cannot be so easily stripped by the stroke of the complaint drafter's pen.

B. Even If The Commission's Claims Were Theoretically The Same As The States', The Commission Still Could Not Assert Them Because North Carolina Is Categorically Immune From Suit By The Commission.

While the plaintiff States are entitled to proceed against North Carolina on whatever claims they can sustain, North Carolina remains immune from suit by the Commission, unless and until (1) North Carolina consents to such suit, or (2) Congress expressly abrogates such immunity. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

Plaintiffs and the Solicitor General cite a third exception to North Carolina's sovereign immunity, *viz.*, a non-State entity may assert claims against a State so long as the same claims are already being pursued by another State or the United States. As already shown, however, this third exception has no application here, because the many months of discovery preceding the filing of cross motions for summary judgment have made clear that the Commission's restitution claim is *not* the same claim the States are asserting. And even if it were, the third exception is contrary to basic principles of Eleventh Amendment and common-law sovereign immunity.

Plaintiffs and the Solicitor General rest the third exception on *Arizona v. California*, 460 U.S. 605 (1983), and *Maryland v. Louisiana*, 451 U.S. 725

(1981), but those cases cannot be reconciled with subsequent precedents re-confirming that "a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *College Sav. Bank*, 527 U.S. at 675 (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

The Solicitor General concedes that this Court's more recent precedents have "understood sovereign immunity as based on something more than jurisdictional limits." U.S. Br. 15 (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)). But according to the Solicitor General, *Arizona's* analysis is consistent with more recent cases (*Maryland* has no substantive analysis at all) because it "simply recognizes that, when a State does not have sovereign immunity against certain claims . . . then the State's sovereign immunity 'is not compromised' by the participation of an additional party in the suit with respect to that same claim." U.S. Br. 15-16 (quoting *Arizona*, 460 U.S. at 614). It is difficult to understand why sovereign immunity should operate that way, if it is a privilege of each State, to be waived only at the State's pleasure (barring abrogation or constitutional consent). The Solicitor General cites no precedent holding that a State's waiver of immunity in a case involving one private party constitutes an automatic waiver of immunity against all private parties who insist they have the "same claim." Likewise, the fact that the States generally consented in the plan of the Convention to suits by other States and the United States does not mean they *also* automatically consented to suits by private parties seeking the same relief.

This case illustrates the practical problem with such an approach. If a private party may overcome a State's sovereign immunity simply by joining a plaintiff State's complaint asserting the same undifferentiated claims, what happens if discovery and summary judgment proceedings show that the State's claims are invalid, leaving only the private party to recover? The Solicitor General surely would agree that the defendant State's sovereign immunity is "compromised" by allowing the private party to recover at that point. Sovereign immunity is about being free from suit without consent, but it is not *only* about being free from the legal process itself -- it is most centrally about avoiding legal exposure to private monetary creditors. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821); *see also Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002) ("suits for money damages against the State" are "the heart of the Eleventh Amendment's concern"). Rather than permit private parties and other non-State entities to join otherwise valid State actions over the objection of non-consenting States, the appropriate approach -- indeed, the only approach consistent with the fundamental nature of sovereign immunity -- is to permit the State to decide for itself when and by whom it may be sued in federal court. To the extent a non-State entity has interests in the claims being asserted, they should by definition be protected by the State already asserting them, if they are truly they same claims -- and to the extent the claims are distinct, that circumstance only underscores the reason the defendant State cannot be forced to litigate that distinct claim absent the State's own consent.

C. North Carolina Has Not Consented To Suit By The Commission, Either In The Southeast Compact Or In The Plan Of The Convention.

Plaintiffs finally argue that even if the Commission's claims are distinct from those of the States (or this Court overrules precedents allowing non-State entities to assert the same claims as States), the Commission's claims should still be allowed to proceed here, either because North Carolina consented specifically to suit by the Commission merely by joining the Southeast Compact, or because the States generally consented to suits by Compact entities in the plan of the Convention. Both arguments are meritless.

1. The Southeast Compact does not reflect a waiver of sovereign immunity by North Carolina. The "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *College Sav. Bank*, 527 U.S. at 675 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)). The State's waiver must be "unequivocally expressed," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984), in language that is "unmistakably clear," *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987). In other words, this Court will "find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citations omitted).

Contrary to plaintiffs' submission, the language of the Compact comes nowhere close to satisfying that stringent test for waiver of North Carolina's immunity from suit in this Court. Plaintiffs, in fact, do not even purport to apply the stringent standard. Instead they argue only that a waiver can be *implied*, from the language in Article 4(E)(10) authorizing the Commission to "act or appear on behalf of any party state or states . . . before . . . any court of law." Pls. Reply 23. Read together with the Commission's sanctions authority in Article 7(F), plaintiffs insist that States entering the Compact "would have understood" that they were exposing themselves to suit by the Commission in federal court to enforce a sanctions order. *Id.* at 24.

This makes no sense. Article 4(E)(10) by its terms merely states that the Commission may appear in any court of law; it does not even *suggest* that the member States consent to be sued by the Commission, much less unequivocally and unmistakably express such consent. Nor does the Commission's sanctions authority alter the analysis. For one thing, that authority is limited to the suspension and revocation of a party State's rights under the Compact -- sanctions that can be imposed and enforced without suit in this Court. For another thing, as this very case illustrates, to the extent that suit must be brought in this Court to enforce a party State's compliance with Compact terms, that suit can be brought by other member States. Because nothing in the express terms or necessary operation of the Compact requires that party States be subject to suit by the Commission, the States did not waive

their immunity from suit merely by joining the Compact.

Plaintiffs rely heavily on the trial and appellate decisions in litigation involving the Central Interstate Low-Level Radioactive Waste Compact, 99 Stat. 1864 (1986) (Pls. Reply Br. 21-25), but those decisions are neither binding on this Court nor relevant even on their own terms. In that litigation, the courts held that Nebraska did unambiguously waive its immunity by entering the Compact, but only because of key provisions in the Central Compact that do not appear in the Southeast Compact. The Central Compact provides not only that its Commission may "initiate any proceedings" before "any court of law" over matters "arising under or relating to the terms of the provisions of this compact" (Article IV.e., 99 Stat. 1866), but also that its Commission shall "require all party states and other persons to perform their duties and obligations arising under this compact by *an appropriate action in any forum designated in section e. of Article IV*" (Article IV.m.8, 99 Stat. 1868). It was the latter provision -- conspicuously absent from the Southeast Compact -- that was held to constitute a waiver of immunity:

> When it signed the Compact, Nebraska consented to a suit brought by the Commission in federal court. The words and structure of the Compact and the Congressional enabling legislation plainly authorize the Commission's suit. In fact, the Commission is "required" to sue Nebraska in

> "any forum" and in "any court of law" chosen by that body. Still further, the Compact specifically provides that the federal court has the power to review disputes between the Commission and Nebraska.

Entergy Arkansas, Inc. v. Nebraska, 68 F. Supp. 2d 1093, 1103 (D. Neb. 1999); *see also* 241 F.3d 979, 986 (8th Cir. 2001) (court of appeals opinion in the same case: "Based on the nature of the Compact and the language of Article IV(e), we held 'that by entering into the Compact, Nebraska waived its [Eleventh Amendment] immunity from suit in federal court by the Commission to enforce its contractual obligations.'"). While *Entergy* thus establishes that a State *can* waive its immunity by joining a Compact that expressly authorizes its Commission to enforce its provisions by suing member States in federal court, it also demonstrates indirectly why North Carolina did *not* waive its immunity by entering into the Southeast Compact, which includes no such enforcement provision.

2. There is also no merit to plaintiffs' contention that the States generally consented to suit by interstate compact entities in the plan of the Convention when they adopted the Interstate Compact provision. As the Solicitor General has explained: "A Compact Clause entity is not a 'State' within the meaning of the Constitution, and the Commission has pointed to no source of authority for Congress to provide that a Compact Clause entity shall have (or be able to assert) the constitutional entitlements of a State in an Article III court as

against a defendant that *is* one of the States of the Union." U.S. Br. No. 131, Orig., at 13.

Plaintiffs' argument that consent to suit by Compact Clause entities is inherent in the Clause itself rests not on any language on the Clause, but on its supposed logic: "It logically follows from the nature of an interstate Compact," plaintiffs contend, "that a Compact Clause entity should be able to sue a State on behalf of a sister State in order to enforce the underlying compact." Pls. Reply 21. But the logic does not follow at all. Plaintiffs do not cite a single case in the first two centuries of the Republic involving a suit by a Compact Clause entity against a party State -- a clear demonstration that such suits are not logically necessary to the operation of the Compact Clause. Again, as this case shows, compacts normally can be enforced by the party States themselves -- there is no inherent reason Compact Clause entities *must* have that same authority, and absolutely no historical evidence that the Framers assumed they would have such authority. To be sure, the drafters of a *particular compact* might believe the compact would function more efficiently if the party States consent to suit directly by the Compact Clause entity, but in such circumstances the States are free to provide that consent as a condition of joining the compact. The States that joined the Central Compact agreed to

that condition, for example; the Southeast Compact States plainly did not.

Plaintiffs again cite *Entergy*, as if the case included a broad holding that States generally waived their immunity from suit by all Compact Clause entities. Pls. Reply 22. The case holds no such thing. Rather, *Entergy* holds only that "in a case *involving a suit brought by a Compact Clause entity specifically authorized to sue a signatory state*, the Eleventh Amendment is not applicable." 68 F. Supp. 2d at 1099 (emphasis added). The very fact that the Central Compact specifically includes a waiver provision establishes that such waivers are not generally implied by the mere existence of the Compact Clause itself.

Because the States did not generally consent to suit by Compact Clause entities merely by ratifying the Compact Clause as part of the Constitution, and because North Carolina did not consent to suit by the Commission merely by joining the Southeast Compact, the Commission's claims must be dismissed.

II. IF NORTH CAROLINA IS ENTITLED TO SUMMARY JUDGMENT ON THE BREACH OF COMPACT CLAIM, THEN PLAINTIFFS' REMAINING EQUITABLE CLAIMS NECESSARILY FAIL AS A MATTER OF LAW.

North Carolina's second exception challenges the Special Master's failure to grant summary judgment on plaintiffs' claims for equitable relief, which are all based on the same conduct plaintiffs allege to be in breach of the Compact. As the long line of precedent cited in North Carolina's opening brief shows, where an express contract governs the parties' relationship, conduct that does not breach the contract cannot be the subject of a separate equitable claim for relief. NC Br. 58-59. Thus, if the Court agrees with the Special Master that North Carolina did not breach the Compact by first suspending its licensing efforts and then withdrawing from the Compact before completing a facility, plaintiffs cannot then circumvent the failure to prove a breach of Compact by recasting it as violative of unwritten equitable obligations.

In response, plaintiffs assert that "equitable claims, such as unjust enrichment, are available as alternatives to a claim for breach of contract." Pls. Reply 26. But as explained by the very authority they cite, that is true only where no "enforceable

contract" already exists between the parties governing the subject matter. Williston & Lord, *A Treatise on the Law of Contracts* § 68:5, at 58 (4th ed. 2003). If there is no valid contract on which to sue, then equity may create an obligation. But where, as here, there is a contract defining the scope and limits of each contracting party's obligations to the other, the cases cited by North Carolina -- almost entirely ignored by plaintiffs -- uniformly hold that equity will not establish an additional obligation, overlooked by the parties, concerning the same subject matter. *See, e.g., Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000) ("When a valid agreement already addresses the matter, recovery under an equitable theory is generally inconsistent with the express agreement."). North Carolina thus does not assert any "sovereign prerogative to prevent other States in the Compact from bringing equitable claims against it." Pls. Reply 29. Rather, plaintiffs' equitable claims fail *on their own terms*, based on the universal judicial understanding that such claims cannot be based on conduct already specifically governed by an enforceable contract that the defendant did not breach.

Plaintiffs' misunderstanding of this principle is reflected in their contention that the $80 million in financial assistance "was conveyed to North Carolina in reliance on the [Compact], not pursuant to an

express term of the Compact," and thus if the Court finds that North Carolina did not breach its Compact obligations, plaintiffs "will be entitled to equitable remedies for providing $80 million to North Carolina in reliance on the Compact." Pls. Reply 27. The conclusion does not follow from the premise; indeed, the premise *refutes* the conclusion. If plaintiffs acted in reliance on a Compact obligation *that North Carolina did not breach*, then North Carolina cannot be compelled by equity to compensate plaintiffs for the damages they allegedly incurred in relying on that obligation. To hold otherwise would be to add to the express Compact an additional, unwritten obligation North Carolina never agreed to assume. The point of the cases cited by North Carolina is that equity *cannot* be used to effectively modify the terms of an express contract that already governs the conduct at issue. *See, e.g.*, *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 50 (Tex. 2008) (where insurer did not breach express contractual coverage obligation, court refused to recognize equitable right to reimbursement).

Plaintiffs have no serious answer to that principle. Their basic position reduces to a plea to be saved from the consequences of their own failure to amend the Compact, or otherwise obtain from North Carolina an express promise to repay the money or license a facility before withdrawing from the

Compact, as a condition of providing financial assistance. So long as North Carolina did not breach an obligation under the Compact in accepting the financial assistance and using it in furtherance of its attempt to license a facility, North Carolina cannot be required by equity to return the money when such licensing efforts were ultimately unsuccessful.

Finally, plaintiffs baldly assert that their equitable claims "rest on factual and legal determinations" the Special Master has not made (Pls. Reply 30), but they do not explain what those determinations are, or how they could preclude summary judgment under the foregoing analysis. There is simply no legal principle, and no fact in the summary judgment record, that would entitle plaintiffs to recover against North Carolina in equity for failing to license a facility, if North Carolina's actions did not breach the Compact defining its licensing obligations. If the Court agrees with the Special Master that, on the undisputed facts, North Carolina did not breach the Compact, the Court should further hold that plaintiffs' equitable claims fail as a matter of law.

CONCLUSION

The Exceptions of the State of North Carolina to the Preliminary Report and the Second Report of the Special Master should be sustained. North Carolina's motions to dismiss all claims brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission and for summary judgment as to Counts III, IV, and V of the Bill of Complaint should be granted.

Respectfully submitted,

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
GRAYSON G. KELLEY*
Chief Deputy Att'y General
JOHN F. MADDREY
Assistant Solicitor General
RONALD M. MARQUETTE
Special Deputy Att'y Gen.
MARK A. DAVIS
Special Deputy Att'y Gen.
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: (919) 716-6900

* *Counsel of Record*

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